

4 RODERIC A. CARUCCI and :  
5 SUZANNE CARUCCI, :  
6 Plaintiffs, : Case No. 3:09-cv-712-RCJ-VPC  
7 vs. : July 9, 2010  
8 WELL FARGO HOME MORTGAGE, a : Reno, Nevada  
9 division of WELL FARGO BANK, :  
10 N.A., a foreign entity; BANK :  
11 OF AMERICA, a foreign entity; :  
12 DOES 1-10, Inclusive, and all :  
13 other persons unknown :  
14 claiming any right title, :  
15 estate, lien or interest in :  
16 the real property described :  
17 herein, :  
18 Defendants. :  
19

15 | TRANSCRIPT OF MOTIONS HEARING

## 17 APPEARANCES:

18 For the Plaintiffs: MICHAEL LEHNERS  
Attorney at Law

21 For the Defendants: DONNA OSBORN  
Attorney at Law

23 Court Reporter: Donna Davidson, RDR, CRR, CCR 318  
Certified Realtime Reporter  
24 400 South Virginia Street  
Reno, Nevada 89501  
25 (775) 329-0132

1 RENO, NEVADA; FRIDAY, JULY 9, 2010, 9:01 A.M.

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3 P R O C E E D I N G S

4

5 THE COURT: Good morning. Thank you. Please  
6 be seated. Welcome.

7 We're here for arguments. We're going to start,  
8 please, with Carucci versus Wells Fargo.

9 MR. LEHNERS: Good morning, Your Honor. My  
10 name is Michael Lehners. I'm specially appearing for  
11 Terry Thomas on behalf of the plaintiff Rod Carucci.

12 MS. OSBORN: Good morning, Your Honor. Donna  
13 Osborn of the law firm Wright, Finlay & Zak on behalf of  
14 defendant Wells Fargo Bank.

15 THE COURT: Thank you. This is the motion for  
16 remand and for dismissal. I'll entertain both of those,  
17 please, if you want to add comments to the pleadings.

18 MR. LEHNERS: Good morning, Your Honor. I'm  
19 appearing for Mr. Thomas on the motion to remand.

20 We believe that remand is proper in this case for  
21 several reasons, the first of which is the nature and  
22 gravamen of the complaint. The complaint really seeks  
23 declaratory relief and was filed in order to find out who  
24 is the owner of the promissory note and deed of trust on  
25 the plaintiffs' subject property.

1                   Paragraph 9 of the complaint asks -- or states that  
2 the plaintiff has demanded to know who the owner of the  
3 promissory note was.

4                   I don't know if this matter is in the record or  
5 not, but I've been told Ms. Osborn has it. On July 6th of  
6 2009, Wells Fargo did issue a response to a RESPA request  
7 propounded by the plaintiff. It says, "The note holder of  
8 this loan is Bank of America, Wells Fargo Home Mortgage is  
9 the servicer of the loan, and we are able to assist with  
10 any questions on behalf of the note owner."

11                  All right. Now, the amount in controversy, Your  
12 Honor, must be shown to be in excess of \$75,000, assuming  
13 there's complete diversity of citizenship.

14                  THE COURT: Do you request a declaration of  
15 invalidity of the loan or any other encumbrance that  
16 exceeds the amount of 75,000?

17                  MR. LEHNERS: Your Honor, we're direct -- my  
18 client is seeking declaratory relief that the loan -- that  
19 these parties do not have an interest in the loan.

20                  It's not attacking the substantive nature of the  
21 deed of trust; i.e., it's not saying that it misidentifies  
22 the property, it was recorded in the wrong county, or the  
23 note is somehow defective. Instead it says Wells Fargo  
24 and Bank of America have no interest in the note.  
25 Somebody else might. We don't know.

1           Now, the reason for this is to find out the  
2 identity of the true holder of the beneficial interest in  
3 this note. This is primarily why the plaintiff filed this  
4 lawsuit. Who really holds the beneficial interest?

5           THE COURT: I don't see anything wrong with  
6 that request. But you understand that under our case law  
7 and state law, they're not required to produce an original  
8 of the note, for example --

9           MR. LEHNERS: Yes.

10           THE COURT: -- on your demand or request.

11           If you're seeking a demand for a payoff figure,  
12 you're entitled to do that under state law; and then, of  
13 course, if you pay it off, you're entitled to the note.  
14 But you're not entitled -- in order to permit them to  
15 proceed with foreclosure, you're not entitled to demand  
16 the original of the note.

17           I see nothing wrong with the request that says who  
18 is the note holder, however.

19           MR. LEHNERS: Your Honor, that's correct. I  
20 have read your recent decision in the Weingartner case,  
21 and it spells it out completely.

22           THE COURT: Okay.

23           MR. LEHNERS: And I'm very well aware of the  
24 clarification between what a servicer does, what the  
25 holder in due course does, and what a beneficial interest

1 is. And I've read that case before coming here. I've  
2 even cited it in other cases that I've had before this  
3 Court.

4 And that's really what we want to find out.  
5 Because these notes -- and there's nothing wrong with  
6 doing this. These notes are bought and sold on a regular  
7 basis. They are securitized. They go to government  
8 pooled trusts. They get assigned to trustees instead of  
9 the government pooled trusts.

10 My client tried to exercise his options under RESPA  
11 before even coming here.

12 THE COURT: Okay. So I see nothing wrong with  
13 the relief you're requesting. The problem is to the  
14 extent you're seeking a declaration that they don't own  
15 the notes --

16 MR. LEHNERS: Yes.

17 THE COURT: -- and if, in fact, they do --

18 MR. LEHNERS: Yes.

19 THE COURT: -- seems to me you have a  
20 controversy that exceeds \$75,000 in amount.

21 MR. LEHNERS: Well, Your Honor, I would  
22 respectfully disagree with that because what does matter  
23 is the value of the --

24 THE COURT: It's not just declaration that  
25 you're seeking. You're seeking -- if these folks are the

1       holders, you're seeking declaration that they don't hold  
2       and they are not entitled to any funds.

3                    MR. LEHNERS: Well, Your Honor, I believe it's  
4       are they the -- do they hold the beneficial interest. In  
5       other words, Wells Fargo -- we have a RESPA letter that  
6       says Wells Fargo is not the holder of the note. They're  
7       not.

8                    THE COURT: Okay.

9                    MR. LEHNERS: So on its face that response to  
10       the RESPA letter doesn't even give them standing. That's  
11       what we're looking for.

12                  In other words, Wells Fargo, you don't have the  
13       beneficial interest in this based upon your RESPA  
14       admission.

15                  Bank of America may be the holder. We don't know  
16       who the beneficial interest is. Somebody is. But not  
17       these two.

18                  THE COURT: Now, the fact of the matter is that  
19       this plaintiff has not been making the payments?

20                  MR. LEHNERS: I believe that's correct, Your  
21       Honor.

22                  THE COURT: And for how long and what has  
23       accrued in the way of arrearage of payments?

24                  MR. LEHNERS: Your Honor, I do believe a notice  
25       to default and election to sell was filed.

1 MS. OSBORN: That is accurate, Your Honor. In  
2 fact, we're in the mandatory arbitration -- mediation  
3 process through AB-149. My firm is representing Wells  
4 Fargo.

5 THE COURT: So you're under state mandatory  
6 mediation process now?

7 MS. OSBORN: Correct.

8 THE COURT: Not mandated by this Court but by  
9 the state law?

10 MS. OSBORN: Correct.

11 THE COURT: Okay, good.

12 MR. LEHNERS: Yes, Your Honor. And that, yet,  
13 is still another reason to remand.

14 It's our position that if the plaintiff recovers  
15 everything that he wants to, he does not obtain a value in  
16 excess of 75,000, rather he obtains the value of knowing  
17 who the beneficial holder is. That's all.

18 THE COURT: Okay. I just disagree with you.  
19 It's not -- you aren't asking for a declaration of who the  
20 owner is, you're asking for a declaration that they have  
21 no interest.

22 MR. LEHNERS: Yes, Your Honor.

23 THE COURT: And if, in fact, they do, or if  
24 there's dispute over that, it seems to me then that  
25 there's a dispute exceeding 75,000.

1                   MR. LEHNERS: Your Honor, I very much respect  
2 that position, but, similarly, what if I were to allege  
3 that I have an interest in the MGM or the hotel/casino;  
4 yet I don't, I never did. Am I really out 75,000, just  
5 because I don't have an interest in a casino where I've  
6 pretty much admitted I don't?

7                   THE COURT: If you alleged -- if you filed a  
8 lawsuit against a foreign -- another state entity --

9                   MR. LEHNERS: Yes, sir.

10                  THE COURT: -- and you alleged I own the MGM, I  
11 think there's diversity.

12                  MR. LEHNERS: Because you have to accept the  
13 allegations in the complaint as true.

14                  But, Your Honor, here it's a defense. They're  
15 saying we will be harmed in excess of \$75,000; yet, there  
16 is no evidence that is in this record that shows that they  
17 ever had an interest to be taken away in the first place.  
18 Their RESPA letter shows quite the contrary.

19                  The value is illusory and, hence, under the 75,000  
20 jurisdictional limit.

21                  Your Honor, that's just my position. I don't wish  
22 to disagree with what you said.

23                  THE COURT: For the record, what's the amount  
24 of the note?

25                  MR. LEHNERS: I'll defer to counsel on that.

1 MS. OSBORN: \$700,000, Your Honor.

2 THE COURT: Okay. All right. Thank you.

3 MR. LEHNERS: Do you have any other questions  
4 of me, Your Honor?

5 THE COURT: No.

6 MR. LEHNERS: The last thing I'd like to say  
7 before I rest this argument on the remand is that I want  
8 to make sure that the Court's aware that a default was  
9 taken in state court. And we have not been able to find  
10 any authority for the proposition that a case can be  
11 removed post default in state court. Thank you, Your  
12 Honor.

13 MS. OSBORN: Your Honor, I'll address this last  
14 issue actually first.

15 We did timely remove the action. I believe we  
16 removed it on the actual 30th day. They took the default  
17 after only 13 business days' notice to my client because  
18 of the Thanksgiving and Veterans Day holiday. They took  
19 the default on the exact day after the service would have  
20 been due on the answer to complaint. But that was only 13  
21 business days. But we did timely remove.

22 I would agree with him that there's no circumstance  
23 where if we had not timely removed it that the Court would  
24 not have jurisdiction. But we did remove it within 30  
25 days of service of the summons and complaint. And I think

1 that's the only requirement to get notice, is that we  
2 timely seek the removal within 30 days.

3 THE COURT: Okay. Why should I dismiss this  
4 complaint, though? If he's not trying to -- if all he's  
5 asking for is he wants a declaration of who owns this  
6 note, he's entitled to that, isn't he?

7 MS. OSBORN: Well, Your Honor, his complaint is  
8 for a cause of action entitled "Quiet Title." Under quiet  
9 title, a quiet title action requests a judicial  
10 determination of all adverse claims to disputed property.  
11 There's no adverse claim with regards to between him  
12 owning the note, owing money on a note --

13 THE COURT: Sure there's an adverse claim.  
14 Somebody out there claims a deed of trust ownership in the  
15 property.

16 MS. OSBORN: Correct.

17 THE COURT: There's an adverse claim.

18 MS. OSBORN: Correct.

19 THE COURT: He's got the right to have a court  
20 declare -- if you're unwilling to declare, he's got the  
21 right to have -- have you declared? Did you tell him Bank  
22 of America, and that's the truth?

23 MS. OSBORN: Your Honor, I -- there is that one  
24 letter. We have not gotten that far into the process.

25 THE COURT: Okay.

1 MS. OSBORN: I've been told over and over  
2 again -- we've had our 26(f) conference with Mr. Carucci,  
3 personally. We've produced our documents to him. The  
4 only thing that he has that says it is, is that one  
5 letter. Everything we have is --

6 THE COURT: So do you have -- as an officer of  
7 the court, do you have any position to tell me as to who  
8 owns the note, the beneficial interest in the note?

9 MS. OSBORN: I don't, Your Honor.

10 THE COURT: Okay.

11 MS. OSBORN: As we --

12 THE COURT: I'm denying your motion to dismiss.  
13 I'm also denying your motion to remand. I'm sorry, I  
14 think the value exceeds 75,000.

15 MR. LEHNERS: Thank you very much, Your Honor.

16 MS. OSBORN: Thank you, Your Honor.

17 THE COURT: I'll issue an order.

18 Thank you for the argument. And I remind Wells  
19 Fargo, they're going to have to answer the question,  
20 please; otherwise, there will be judgment. Okay.

21 (The proceedings were concluded at  
22 9:11 a.m.)

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I certify that the foregoing is a correct  
transcript from the record of proceedings  
in the above-entitled matter.

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Donna Davidson

8/9/10

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Donna Davidson, RDR, CRR, CCR #318  
Official Reporter

Date

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